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Choong Yee Fong v Ooi Seng Keat & Anor

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8(S4)–33–917 OF 1998

B FAIZA TAMBY CHIK J
27 OCTOBER 2004

Family Law — Divorce — Adultery — Burden of proof

C *Family Law — Financial obligation — Maintenance — Maintenance of wife — Interim monthly maintenance — Factors to be considered — Earning potential of wife — Law Reform (Marriage and Divorce) Act 1976 s 78*

Family Law — Matrimonial property — Division of property — Marriage dissolved —
D *Whether property jointly acquired — Extent of contributions by wife to the welfare of the family — No children from marriage — Whether payment of utility bills to be taken into account — Law Reform (Marriage and Divorce) Act 1976 s 76(5)*

E The petitioner and the respondent registered their marriage on 24 March 1984. They have no children born to their union. Both the respondent and the petitioner were gainfully employed throughout the subsistence of the marriage and before the separation lived in the property in Desa Aman ('the Desa Aman property') which was purchased and paid for by the respondent before the marriage and is registered under
F the respondent's sole name whereas another property in Taman Shamelin Perkasa ('the apartment') was purchased in 1992 (after the marriage) and registered in the sole name of the petitioner but payments were made by the respondent as stated in the respondent's affidavit. The dissolution of marriage was based on the petitioner's petition alleging the respondent's adultery with the co-respondent pursuant to s 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The
G respondent denied this allegation and the respondent's cross-petition was on the ground of two years separation. The three main issues for consideration were: (a) whether the dissolution of marriage should be granted on the alleged ground of adultery or on the ground of two years separation; (b) whether the petitioner is entitled to claim in the alleged Desa Aman property purchased prior to the marriage
H which the petitioner alleged is matrimonial property; and (c) whether the petitioner is entitled to a claim for maintenance for herself.

Held:

I (1) The petitioner must prove to the satisfaction of the court beyond reasonable doubt that the respondent had committed adultery and it was due to the alleged adulterous relationship which led to the breakdown of the marriage. This principle was upheld in the case of *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222 (see para 4).

(2) The Desa Aman property was not a matrimonial property as provided in s 76 of the Act. The only way the petitioner may have a claim to the Desa Aman property was in the so called incremental value of the property under s 76(5) of the Act. There had not been an iota of evidence to prove that the petitioner had contributed in any manner. The petitioner had failed to prove how and in what specific manner these alleged acts of contribution had substantially improved the value of the property. The petitioner's monthly expenses which said to include utility bill payments and assessment ('cukai pintu') were not contribution within the context and contemplation of s 76(5) of the Act (see para 5).

(3) As for the claim for maintenance in arrears, s 86(1) of the Act expressly provides that there must be an existing court order to compel the respondent to pay maintenance to the petitioner or alternatively there must be an agreement between the parties that the respondent pay monthly maintenance to the petitioner. On the facts of this case, there was no agreement between both the respondent and the petitioner and/or a court order against the respondent to pay maintenance to the petitioner. This being the facts of the case, the petitioner had therefore failed to prove to this court that she was entitled to any for arrears in maintenance for herself (see para 8).

(4) As for interim monthly maintenance, it was established that the petitioner who was 41 years of age, able bodied and until her alleged unemployment in 2001 was earning a salary of RM1,800 per month certainly has earning potential with relevant past working experience which help enhance her earning power in the market work force. The petitioner had the means within the contemplation of s 78 of the Act, to be self-sufficient and self-reliant to which her claim for maintenance to support herself must necessarily fail (see para 9).

[Bahasa Malaysia summary

Pempetisyen dan responden mendaftarkan perkahwinan mereka pada 24 Mac 1984. Mereka tidak mempunyai anak daripada perkahwinan tersebut. Kedua-dua pempetisyen dan responden bekerja sepanjang masa mereka berkahwin dan sebelum perpisahan mereka telah tinggal di Desa Aman ('hartanah Desa Aman') yang dibeli dan dibayar oleh responden sebelum perkahwinan mereka dan didaftarkan atas nama responden seorang manakala satu hartanah yang lain di Taman Shamelin Perkasa ('pangsapuri') yang dibeli pada 1991 (selepas perkahwinan) didaftarkan atas nama pempetisyen seorang tetapi pembayaran dibuat oleh responden seperti yang dinyatakan di dalam afidavit responden. Pembubaran perkahwinan adalah berdasarkan dakwaan pempetisyen bahawa responden melakukan zina dengan responden bersama di bawah s 54(1)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu'). Responden telah menafikan dakwaan tersebut dan petisyen balasnya untuk pembubaran perkahwinan adalah berdasarkan dua tahun perpisahan. Terdapat tiga isu yang perlu dipertimbangkan iaitu: (a) sama ada pembubaran perkahwinan patut diberi atas dakwaan zina ataupun dua tahun perpisahan; (b) sama ada pempetisyen berhak menuntut hartanah Desa Aman yang dibeli sebelum perkahwinan mereka di mana pempetisyen menyatakan adalah

hartanah perkahwinan; dan (c) sama ada pempetisyen berhak menuntut nafkah untuk dirinya.]

Diputuskan:

(1) Pempetisyen mesti membuktikan kepada mahkamah melampaui keraguan munasabah bahawa responden telah melakukan zina yang menyebabkan kegagalan perkahwinan tersebut. Prinsip ini dipakai di dalam kes *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222 (lihat perenggan 4).

(2) Hartanah Desa Aman bukan satu hartanah perkahwinan seperti di dalam s 76 Akta itu. Pempetisyen hanya mempunyai tuntutan terhadap Hartanah Desa Aman jika terdapat tambahan nilai hartanah tersebut di bawah s 76(5) Akta itu. Tiada sebarang keterangan yang dapat membuktikan pempetisyen menyumbang dalam sebarang apa cara pun. Pempetisyen juga gagal membuktikan bagaimana dan secara mana yang dapat dinyatakan penyumbangannya telah mempertingkatkan dengan secara besar nilai hartanah tersebut. Perbelanjaan bulanan pempetisyen yang dikatakan termasuk pembayaran bil-bil dan cukai pintu bukannya satu sumbangan yang dimaksudkan oleh s 76(5) Akta itu (lihat perenggan 5).

(3) Dalam soal tuntutan tunggakan nafkah, s 86(1) Akta itu dengan jelas menyatakan bahawa mesti wujudnya satu perintah mahkamah memaksa responden membayar nafkah kepada pempetisyen atau secara alternatif mesti terdapat satu persetujuan di antara pihak-pihak bahawa responden akan membayar nafkah bulanan kepada pempetisyen. Dalam fakta kes ini, tiada persetujuan di antara responden dan pempetisyen dan/atau satu perintah mahkamah terhadap responden untuk membayar nafkah kepada pempetisyen. Berdasarkan fakta ini, pempetisyen dengan ini gagal membuktikan kepada mahkamah kenapa dia berhak menuntut tunggakan nafkah untuk dirinya sendiri (lihat perenggan 8).

(4) Dalam soal tuntutan nafkah bulanan, ia dapat dibuktikan bahawa pempetisyen seorang yang berumur 41 tahun, berkeupayaan dan sehingga dakwaannya bahawa dia tidak bekerja semenjak 2001 telah memperoleh gaji sebanyak RM1,800 sebulan menunjukkannya mempunyai potensi bergaji dan dengan pengalaman pekerjaannya yang lepas, akan dapat mempertingkatkan lagi keupayaannya di pasar pekerjaan. pempetisyen mempunyai keupayaan seperti yang dihasratkan oleh s 78 Akta itu, iaitu berkeupayaan sendiri dan dapat bergantung pada diri sendiri di mana tuntutannya untuk nafkah untuk menampung dirinya mestilah gagal (lihat perenggan 9).

Notes

For cases on adultery in divorce, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2888–2900.

For cases on division of matrimonial property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3322–3413.

For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3120–3146.

Cases referred to

Button v Button [1968] 1 WLR 457 (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (distd)
Kang Ka Heng v Ng Mooi Tee & Anor [2001] 3 MLJ 33 (folld)
Karen Cheong Yuen Yee v Phua Cheng Chuen [2004] MLJU 291 (refd)
Leow Kooi Wah v Ng Kok Seng Philip [1995] 1 MLJ 825 (distd)
Lim Bee Cheng v Christopher Lee Joo Peng [1997] 4 MLJ 35 (refd)
Ng Hee Thong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Ng Lean Huat v Lim Joo Khim [1993] MLJU 281 (distd)
Phua Beng Hong v Ho Shik Ho [2000] 2 MLJ 289 (refd)
Rose v Rose [1950] 2 All ER 311 (folld)
Shanmugam v Pitchamany & Anor [1976] 2 MLJ 222 (folld)
Shi Fang v Koh Pee Huat [1996] 2 SLR 221 (refd)
Shilpa J Doshi v Jitendra Chhotalal Doshi [2004] 6 CLJ 113 (refd)
Shirley Koo v Kenneth Mok Kong Chua [1998] 2 MLJ 264 (refd)
Thevathasan v Thevathasan [1960] MLJ 255 (folld)
V Sandrasagaran a/l Veerapan Raman v Dettarassar Velentine Souvina Marie (Divorce Petition No 33–185 of 1993) (refd)

Legislation referred to

Divorce and Matrimonial Rules 1980 O 24, O 25
Evidence Act 1950 s 113(g)
Law Reform (Marriage and Divorce) Act 1976 ss 53, 54(1)(a), (d), 76(5), 77(1), 78, 86(1)

Ahmad Shamsul (KC Tan with him) (LC Chong & Co) for the for the petitioner wife.
PH Cheah (WH Kan with him) (Azam Malek & Co) for the respondent husband.
Darshan Singh (Darshan Singh Chong & Co) for the second respondent.

Faiza Tamby Chik J:

[1] The three main issues for consideration are as follows:

(a) whether the dissolution of marriage should be granted on the alleged ground of adultery as in the petition by the petitioner or dissolution of marriage should be granted on the ground of two years separation as in the respondent's cross petition;

(b) whether the petitioner is entitled to claim in the alleged property purchased prior to the marriage which the petitioner alleged is matrimonial property namely the property known as No 52, Jalan 9/101, Desa Aman, Jalan Cheras, 56100 Kuala Lumpur ('the Desa Aman property'); and

(c) whether the petitioner is entitled to a claim for maintenance for herself.

[2] The following facts are not in dispute, that:

(a) the petitioner and the respondent registered their marriage at 'Persatuan Perniagaan Tionghua Johor' in 24 March 1984;

(b) there are no children born to their union;

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(c) both the respondent and the petitioner were gainfully employed throughout the subsistence of the marriage;

(d) the respondent and the petitioner, before the separation lived in the property known as No 52, Jalan 9/101, Desa Aman, Jalan Cheras, 56100 Kuala Lumpur ('Desa Aman property') and thereafter the separation on 14 March 1994, the petitioner continues to live at the Desa Aman property until today and the respondent lives elsewhere;

(e) the Desa Aman property was purchased and paid for by the respondent before the marriage and the Desa Aman property is registered under the respondent's sole name;

(f) the property known as at 14-1-12 (Lot K0115), Jalan 2/91-A Taman Shamelin Perkasa, 56100 Cheras, Kuala Lumpur ('the apartment') was purchased in 1992 (after the marriage) and registered in the sole name of the petitioner but payments were made by the respondent as stated in the respondent's affidavit at paras 8 to 12 of encl 84;

(g) both parties agree that the marriage has broken down irretrievably based on the ground that parties have lived apart for two years immediately preceding the cross petition being filed by the respondent (see para 13 of petitioner's reply at encl 60) where else the ground of alleged adultery is disputed by the respondent.

First Issue: Dissolution of Marriage is based on the Petitioner's Petition or the Respondent's Cross Petition

[3] The petitioner had alleged that the marriage has irretrievably broken down as a result of the respondent's alleged adultery with the co-respondent pursuant to s 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The respondent has vehemently denied this allegation and to date this allegation by the petitioner remains unproven. However, the respondent had stated in his cross petition that the marriage has broken down irretrievably as both parties have lived apart for two years immediately proceeding the filing of the cross petition under s 54(1)(d) of the Act. This fact of the marriage having broken down due to the parties living apart for two years has been admitted by the petitioner in her reply to the respondent's cross petition at para 13 encl 60. Under s 53 of the Act, the court is required to look or enquire into the facts alleged in the petition and/or the cross petition which cause or led to the breakdown of the marriage. The court thereafter, if satisfied that the circumstances make it just and reasonable to do so, should then make a decree for the dissolution of the marriage having regard to the alleged facts as provided in s 54 of the Act. In the present petition before me, both the petitioner in her petition and her reply to the cross petition (encls 83 and 60 respectively) and the respondent in his cross petition (encl 56), are in agreement that the marriage has broken down irretrievably on two years separation, namely both parties have lived apart for two years as provided under s 54(1)(d) of the Act. The respondent in his cross petition stated the reason of the breakdown of the marriage is due to the petitioner and respondent having lived apart for a continuous period of two years

immediately preceding the presentation of the cross petition for divorce pursuant to s 54(1)(d) of the Act. This fact was agreed to and consented by the petitioner in her reply at encl 60 at para 13. The petitioner's reply to the respondent's cross petition at para 13 of encl 60 is as follows:

> Dalam jawapan kepada perenggan 27 hingga 30, jawapan dan petisyen balas (encl 56) bertarikh 24 Oktober 2002, pihak pempetisyen bersetuju bahawa perkahwinan pihak pempetisyen dan pihak responden hendaklah dibubarkan.

[4] The cause for the breakdown in the marriage is that the parties had lived apart for a continuous period of at least two years immediately preceding the filing of the cross petition. Hence, it is clear that the petitioner in her averment in para 13 of encl 60 agreed and consented that the marriage has broken down irretrievably due to the parties having lived apart for two years immediately preceding the filing of the cross petition. The respondent has proven to this court that both parties have since lived separately in 1994. It is also an undisputed fact that since the parties' separation in 1994 both the respondent and the petitioner are at all material time gainfully employed and self-sufficient. Both parties have managed and lived their lives independently of each other. Further, there are no children born to this union

[5] The petitioner must prove to the satisfaction of the court beyond reasonable doubt that the respondent had committed adultery and it is due to the alleged adulterous relationship which led to the breakdown of the marriage. This principle is upheld in the case of *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222 where Hashim Yeop A Sani J (as he then was) stated:

> It is well established in law that an allegation of this nature must be proved to the satisfaction of the court beyond reasonable doubt. In *Rayden on Divorce* (12th Ed) p 193, it is said: the burden of proof is throughout on the person alleging adultery, there being a presumption of innocence.

[6] This is reiterated in the High Court case of *Kang Ka Heng v Ng Mooi Tee & Anor* [2001] 3 MLJ 331 where VT Singham JC (as he then was) stated:

> It is settled law that an allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt.

[7] The petitioner has not proven to this court beyond reasonable doubt that there was adultery and that the adultery has led to the breakdown of the marriage. In *Leow Kooi Wah v Ng Kok Seng Philip & Anor* [1995] 1 MLJ 852 cited by the petitioner, it must be observed that since both the respondent and co-respondent were not contesting the allegation of adultery as claimed by the wife petitioner and since the facts of the adultery was not opposed, it would rightly be an admission that the adultery had led to the breakdown on the marriage. However, in this instant case the Respondent has consistently maintained in his pleading, namely in his reply to the petition and cross petition, that the breakdown of the marriage was due to the parties having lived separately for two years immediately before the cross petition was filed

and not due to adultery. Hence, the decision in *Leow Kooi Wah* has no application herein and is distinguishable. In *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] MLJU 291, I stated:

> The above allegation briefly falls under the following grounds for divorce namely:
>
> (a) adultery;
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> (b) cruelty (physical and mental);
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> (c) drunken behaviour of respondent/gross misbehaviour;
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> (d) irretrievably broken down of as a result of the respondent's gross misbehaviour.

[8] The respondent had in his reply denied those allegation enumerated in grounds (a) to (d) and in fact has averred that the marriage has been irretrievably broken down as a result of the petitioner's own misbehaviour. With regards to grounds (a) to (d) I observe that the petitioner has not even furnished any specific particulars or even offered any evidence to substantiate her allegations. I think these are bare allegations.

Second Issue: Division of the Matrimonial Assets

[9] In addition to the divorce the petitioner is seeking for and claiming the matrimonial assets as in prayer 4(b) of encl 83. The petitioner in her prayer has failed to identify the specific matrimonial assets which she seeks to be divided and has made no application for discovery under O 24 and O 25 of the Divorce and Matrimonial Rules 1980 to ascertain the alleged properties. The petitioner's claim for a division of matrimonial assets is ambiguous because the Petitioner had failed to identify and list out the particulars of the alleged matrimonial assets. The property known as No 52, Jalan 9/101 Desa Aman, Jalan Cheras, 56100 Kuala Lumpur was not prayed for in the petition. The petitioner is bound by what she has prayed for and since this Desa Aman property was not prayed for, the petitioner's claim would be dismissed. However, I am of the opinion that the Desa Aman property is not a matrimonial property as provided in s 76 of the Act. The only way the petitioner may have a claim to the Desa Aman property is in the so called incremental value of the property under s 76(5) of the Act which states:

> For the purposes of this section references to assets acquired during a marriage include assets owned before the marriage by one party which has been substantially improved during the marriage by the other party or their joint efforts.

[10] It is clear from the wordings in the provision that the petitioner must adduce evidence to this court to show that the matrimonial asset has been substantially improved during the subsistence of the marriage by the effort of the petitioner. To date there has not been an iota of evidence to prove that the petitioner has contributed in any manner. The petitioner has failed to prove how and in what specific manner these alleged acts of contribution had substantially improved the value of the property. The petitioner's monthly expenses which said to include utility bill payments and assessment ('cukai pintu') are not contribution within the context and contemplation of s 76(5) of the Act. The court has refused to accept contribution which include utility bill payments and assessment. In the case of *Lim Bee Cheng v*

Christopher Lee Joo Peng [1997] 4 MLJ 35, Vincent Ng J refused to give greater weight or significance to the contributions of the wife petitioner on the following instance:

> ... that the quit rent and assessment paid by the petitioner (wife) since 1980 and the payment towards redemption of the matrimonial home after the order for judicial separation dated 26 February 1979 was made solely for the benefit and convenience of the petitioner...

[11] In *Shilpa J Doshi v Jitendra Chhotalal Doshi* [2004] 6 CLJ 113, I had disallowed the wife petitioner who sought to claim properties alleged to be matrimonial assets and stated:

> To date, the petitioner has in all affidavits filed thus far failed to specify the contribution she made towards the acquisition of the properties she refers to as 'matrimonial properties'. I think the failure of her to state so is deemed to be an admission by her that she did not in any way contribute towards the properties she now calls 'matrimonial properties' The petitioner has failed to provide a single receipt for any of the monies she spent on the family, the house, the renovation or improvements or any other contribution she made to the family.
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> … If indeed there were receipts to prove the petitioner's contribution to the family or the home she should have produced the same. I therefore invoke the adverse inference under s 113(g) of the Evidence Act 1950 on the petitioner's failure to produce proof of her contribution. As such the petitioner is not entitled to any of the properties …

[12] In *Shi Fang v Koh Pee Huat* [1996] 2 SLR 221 (CA), the contribution was considered de minimis wherein the Court of Appeal stated:

> Since the house was acquired long before the marriage, if the wife was to be entitled to share in the house, she had to rely on s 106(5) of the Women's Charter. On the facts, none of the matters which she said she did, whether taken singly or together, could constitute a substantial improvement of the house. All the contributions assuming they had been made were de minimis. The wife was, therefore not entitled to any share in the house.

[13] In *Phua Beng Hong v Ho Shik Ho* [2000] 2 MLJ 289, the wife's claim for a division of a house acquired by the sole effort of the husband by way of her contribution as a housewife since 1972, caring for her mother-in-law for 13 years and their son since birth so that the property in question could be regarded as having been acquired by the joint effort of both the parties was dismissed by the Court of Appeal. *Button v Button* [1968] 1 WLR 457 (CA) was quoted with approval:

> … The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit to the family without altering the title to, or interest in the property...

[14] Dennis Ong JCA in the Court of Appeal in *Phua Beng Hong v Ho Shik Ho* further stated (at p 304):

A There are no evidence on our present case to establish the appellant used her own money to run the house and family or to buy furniture or crockery for the house and Mr Navaratnam did not identify any. Further there was no evidence that Asset 3 (the said property in contention) had appreciated in value. On the facts of this case without more we could not see how the liberal approach adopted by this court in *Ching Seng Woah*'s case could be applied.

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[15] The case *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 quoted by the petitioner must be distinguished from the facts of the case. In *Ching Seng Woah*, the Court of Appeal recognizes 'substantial improvement' to include acts of using substantial sums of the wife's own money to run the house and family for a period C of 18 years. The Court of Appeal further quoted with approval *Shirley Koo v Kenneth Mok Kong Chua* [1998] 2 MLJ 264 and stated:

That where the purchase by the wife of kitchen cabinet, crockery, pots and pans and the payment of servant's salary, food in grocery bills were all added up as her contribution to a semi-detached house which the husband claimed he had solely acquired because he alone D had paid for it. From the time she began it as a going concern, its value appreciated from RM29,000 to RM175,000 partly as a result of her efforts also.

[16] The affidavit filed by the petitioner is in relation to her application for ancillary relief is at encl 78. At para 4(d) together with the exh 'CYF-4' encl 79, the E petitioner has exhibited photographs of the dilapidated state of the Desa Aman property. I think if the Desa Aman property (which is currently occupied solely by the petitioner to the exclusion of the respondent since the separation in 1994) is in such a shamble and inhabitable state it raises the question of whether the petitioner has made 'substantial improvement' as required by s 76(5) of the Act. I am of the F view that based on the evidence produced by the petitioner herself, namely the photographs at exh 'CYF-4' encl 79, the petitioner has not only failed to prove to this court that there was no improvement on the Desa Aman property but had allowed the Desa Aman property to deteriorate to such a dilapidated stated which would for certain diminish its value.

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[17] As to the property known as 14-1-12 (Lot KOI 14) Jalan 2/91A Taman Shamelin Perkasa, 56100 Cheras Kuala Lumpur ('the apartment'), this apartment was bought in 1992 during the subsistence of the marriage. The respondent does not intend to seek a division on the apartment, the respondent asserts that the apartment was purchased by the respondent. The respondent has at all material time maintained H that the deposit payment towards the apartment was solely paid for by the respondent, to which a loan was taken to finance the balance purchase price. The respondent has averred in his affidavit at paras 8 to 12 (encl 84) which give a detailed account of the monetary contributions made by the respondent towards the purchase and payment for the monthly installments of the apartment. The respondent further I substantiates his averment with evidence in exhs 'OSK-2' and 'OSK-3' at encl 84. This affidavit evidence in encl 84 was never replied to by the petitioner and is therefore deemed admitted by the petitioner in accordance with the principle in *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA) where the Court of Appeal holds that failure to refute such positive allegation amount to an admission. It states:

Now it is a well settled principle governing the evaluation of affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

[18] Therefore I conclude that the petitioner has admitted to the fact that the respondent had paid and contributed towards the purchase of the apartment in 1992 which is during the subsistence of the marriage thereby making the property a matrimonial asset.

Third Issue: Claim for Maintenance by the Petitioner

[19] I am of the opinion that the arrears in maintenance claimed by the petitioner in prayer 2 of the petition for the sum of RM3,990 has no legal basis as there is no existing interim maintenance order granted by the court to compel the respondent to pay maintenance to the petitioner. In fact other than the petition, the petitioner has not filed and applied for interim application for maintenance, a relief which she could have resort to but did not. Section 86 of the Act states as follows:

Section 86 Recovery of arrears of maintenance

(1) Subject to subsection (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.

(2) Subject to subsection (3), arrears of unsecured maintenance which accrued due before his or her death, shall be a debt due from his or her estate.

(3) No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

[20] Section 86(1) of the Act expressly provides that in order for the petitioner to claim for maintenance in arrears, there must be an existing court order to compel the respondent to pay maintenance to the petitioner or alternatively there must be an agreement between the parties that the respondent pay monthly maintenance to the petitioner. On the facts of this case, there is no agreement between both the respondent and the petitioner and/or a court order against the respondent to pay maintenance to the petitioner. This being the facts of the case, the petitioner has therefore failed to prove to this court that she is entitled to any for arrears in maintenance for herself. In the case of *Shilpa J Doshi* where the wife sought for a similar prayer, I aptly stated that:

… there is no order prior to the said consent orders, ordering the respondent to pay the petitioner any maintenance, as such there is no question of any outstanding arrears to be claimed by the petitioner …

It is therefore must follow that prayer 2 in the petition seeking for arrears in maintenance must necessarily be dismissed.

[21] In prayers 3 and 4(a) of the petition, the petitioner seeks a monthly maintenance sum of RM1,200. The law under 77(1) of the Act empowers this court to order maintenance payment against the husband for the benefit of the wife. This court in assessing whether a wife is entitled to such a payment, is guided by the wordings in 78 of the Act. Both ss 77 and 78 of the Act provide:

> Section 77 Power for court to order maintenance of spouse
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> (1) The Court may order a man to pay maintenance to his wife or former wife —
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> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive.
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> (2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.
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> Section 78 Assessment of Maintenance
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> In determining the amount of maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

[22] It may be summed up that s 78 of the Act requires this court to assess the means and the needs of both the petitioner and the respondent and also their respective conduct which contributed to the irretrievable breakdown of the marriage, in coming to a decision if the petitioner is entitle to a maintenance at all and if so, the amount to be awarded. In first assessing the means of the petitioner, attention is drawn to the petitioner's affidavit at para 9 (encl 76). The petitioner has averred therein that she was at one time until 2001, drawing a salary of RM1,800. The respondent in disclosing his financial ability at paras 17 to 24 of encl 77 has averred that the average monthly income received by the respondent is RM2,800. The petitioner has been at all material time gainfully employed. The petitioner is not in a situation where she is incapable of supporting herself but rather a case where there is an able bodied petitioner who refuses to seek employment in order to claim for maintenance from the respondent. This refusal to be self-supportive is further proven by the petitioner herself whereby despite of her alleged tight financial situation, the petitioner has shown total lack of initiative in mitigating her financial woes but has instead went on a spending spree as evidenced by her indiscriminate use of credit cards facilities which according to the petitioner's averment at para 12(a) and (b) of encl 76 amounts to a total sum of RM114,668.64. The potential earning power of the claimant must also be considered. In *Thevathasan v Thevathasan* [1960] MLJ 255, the District Court of Appeal in Singapore considered with approval the English authority of *Rose v Rose* [1950] 2 All ER 311 wherein Denning LJ stated as follows:

... if she (ie the wife) is a young woman with no children, and obviously ought to go out to work in her own interest, but does not then her potential earning ought to be taken into account...

[23] The Singapore District Court of Appeal in *Thevathasan* similarly took the same view and this was so expressed as follows:

In the present case, I took the view the respondent ought to go out to work in her own interest. She is a young woman with no children, and work with its attendant responsibilities would help to develop her character along the right lines...

[24] Therefore applying the principle enunciated by the cases cited above, to the facts before me, it can be established that the petitioner who is 41 years of age, able bodied and until 2001 was earning a salary of RM1,800 per month certainly has earning potential with relevant past working experience which help enhance her earning power in the market work force. The petitioner has in her own affidavit at paras 13 and 14 of encl 76 admits to renting out on the asset, namely the apartment at RM620 per month (with a market potential rental rate of RM700 per month see exh CYF at encl 79) whilst the installment payment to the bank is RM470. This indicates that the petitioner ears an income of RM150 per month from the apartment. In gist, the petitioner has the means within the contemplation of s 78 of the Act, to be self-sufficient and self-reliant. It must be emphasized that the marriage though registered in 1984, has lasted for less than 10 years and with no children. Although the parties have since lived separately in 1994, the marriage, for all intents and purposes, has broken down irretrievable even before the physical separation in 1994. The petitioner who was 31 years of age in 1994 was working and self-supportive until her alleged unemployment in 2001. There are no children born to the parties as a result of their marriage. The petitioner has been able to support herself financially since the parties have lived apart in 1994. The petitioner's needs are limited to the expenses incurred on herself. This scenario is similarly found in the unreported case of *V Sandrasagaran a/l Veerapan Raman v Dettarassar Velentine Souvina Marie* (Divorce Petition No 33–185 of 1993) whereby I stated:

With no children to the marriage the respondent would be able to adjust herself to her former position within a short period of time. Being capable young woman and since she had worked before, she would be able to find a job and fend for herself.

[25] The case of *Ng Lean Huat v Lim Joo Khim* [1993] MLJU 281 cited by the petitioner is not applicable to the facts before me because in *Ng Lean Huat*, the court had to consider the compelling factor of the existence of a child of the marriage whom was in the custody of the wife who was seeking maintenance. The facts before this court do not involve a child and hence the aforementioned is not applicable. With regards the conduct of the parties lending to the irretrievable breakdown of the marriage, I think both parties are in agreement they have lived apart for a continuous period of two years proceeding the filing of the cross petition and the allegation of adultery was not proven to this court, that it had led to the irretrievable breakdown of the marriage. I therefore conclude the claims for interim maintenance and maintenance upon the dissolution of marriage in prayers 3 and 4(a) of the petition would be dismissed with costs.

[26] The relief prayed for by the petitioner in encl 75 are primarily for alleged arrears of maintenance and for an interim monthly maintenance. The prayers in the application for ancillary relief are similar to prayers 2, 3 and 4(a) pleaded in petition by the petitioner. I think contrary to the petitioner's allegation, the petitioner has the capacity to seek employment and therefore is equipped with potential earning power to which her claim for maintenance to support herself must necessarily fail. There is no basis for the petitioner to move this court to order security for maintenance by vesting property in trust as per case of *Leow Kooi Wah v Ng Kok Seng Philip* [1995] 1 MLJ 825. In the application for ancillary relief (encl 75), the petitioner apart from claiming maintenance for herself, did not pray for division of matrimonial assets.

[27] The respondent's cross petition for a dissolution of the marriage is premised upon the ground that the marriage has broken down irretrievably based on the fact that both parties have lived apart for two years immediately preceding the filing of the cross petition. The petitioner has admitted to this fact and the respondent has also proven to this court that parties have lived apart for two years before the filing of the cross petition. The petitioner on the other hand has failed to prove to this court beyond reasonable doubt that the alleged adultery pleaded in the petition is the cause for the irretrievable breakdown of the marriage. Therefore in accordance with s 54(1) of the Act, if this court is satisfied that at least one of the grounds under s 54(1) of the Act is proven a dissolution of marriage should be granted. In this suit before me, it has been proven that there is a two-year separation between the parties immediately preceding the filing of the cross petition and the petitioner herself has admitted to the same. In this regard, I order the dissolution of marriage is based on the cross petition and that the petition is hereby dismissed. The claim for matrimonial assets by the petitioner pertaining to the Desa Aman property was not pleaded for by the petitioner in the petition and the application for ancillary relief. The petitioner has at all material time failed to produce evidence of her contribution during the subsistence of the marriage towards 'substantially improving' the Desa Aman property within the contemplation of s 76(5) of the Act and the relevant cases cited in support thereof. Hence the petitioner's claim for a division of matrimonial assets in prayer 4(b) of the petition is hereby dismissed. It is proven that the petitioner has the earning power to be self-sufficient, despite the petitioner's allegation of 'incapability'. There is no evidence to prove the petitioner's incapability. The petitioner has throughout the marriage proven to be financially independent and was at all material time gainfully employed. This continues to be so, even after the parties have lived separately in 1994. Therefore, the claim for maintenance in prayers 3 and 4(a) of the petition and the application for ancillary relief in encl 75 is hereby dismissed.

[28] For these reasons in respect of encl (83) dated 7 May 2004 by the petitioner, I make the following orders in respect of the following prayers:

(1) order in terms;

(2) dismissed;

(3) dismissed;

(4) dismissed;

(5) each party bears its own costs.

Compensation for adultery is dismissed.

[29] In respect of encl (75) dated 7 August 2003 by the petitioner, the application is hereby dismissed.

Order accordingly.

Reported by Sally Kee